motion. See T.R. (absence of response to motion); and videotape of hearing on motion held on February 26, 2004.

In spite of this clear and convincing, unrebutted, evidence, the Court did, erroneously, conclude that the conviction and sentence should not be set aside. T.R. at 118 and 121.

That erroneous decision was timely appealed to the Kentucky Court of Appeals. T.R. at 122-123. On July 15, 2005, the Kentucky Court of Appeals rendered its opinion [Pet. App. at 2a], affirming the circuit court's order. [Pet. App. at 7a]. That Kentucky Court of Appeals' opinion has not been officially reported. A motion for discretionary review was timely filed with the Supreme Court of Kentucky. The Supreme Court of Kentucky denied petitioner's motion for discretionary review in an unreported order dated December 14, 2005. [Pet. App. at 1a].

REASONS FOR GRANTING THE PETITION

This case raises an important constitutional question concerning the proper function and role of the guidelines established by the American Bar Association (ABA) and the National Legal Aid and Defender Association for criminal defense (NLADA).

The record below contains volumes of evidence showing that Petitioner's trial counsel failed to observe these well-established professional guidelines. Petitioner presented these facts showing uncontradicted proof of ineffective assistance of counsel to the trial court (Ohio Circuit Court) and the Commonwealth in writing and again at a hearing held on the motions to set aside the conviction and sentence. None of these facts were rebutted by the Commonwealth. The trial court denied the motions and the matter was then appealed.

Despite a large body of evidence showing ineffective assistance of counsel, the Kentucky Court of Appeals affirmed the trial court's opinion. It recognized the existence of the guidelines; however, it refused to give any weight to them, holding that although they are salutary --"they are just that-guidelines." (Kentucky Court of Appeals Opinion Affirming, p. 4). Confusingly, the Kentucky Court of Appeals did acknowledge the "important function" that the guidelines serve. Id. If the guidelines do serve important function the courts below should not have been satisfied with the trial counsel's performance. This begs the question -- "what is the important function of the guidelines?" Criminal defense lawyers observe the guidelines because they bear in mind that these guidelines set forth the ***minimum*** standards for a reasonable performance. If substantial deviation or even a direct violation of these guidelines is not grounds for ineffective assistance of counsel, it can only be said that these guidelines are without any value, as there is no adverse consequence suffered if a lawyer chooses not to observe them.

The importance of placing significant reliance on ABA standards in determining effectiveness of counsel's assistance is clearly supported by this Court.

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L. Ed. 2d 471 (2003) this Court held, by a 7-2 vote, that counsel's investigation and presentation "fell short of the standards for capital defense work ***articulated by the American Bar Association . . . standards to which we have long referred as 'guides to determining what is reasonable.'***" 123 S. Ct. at 2536-37 (Emphasis added). This Court concluded that the ABA guidelines set the applicable standards of performance for counsel. Id.

In a recent case concerning ineffective assistance of counsel, Rompilla v. Beard, 125 S.Ct. 2456, 162 L. Ed. 2d 360 (2005), this Court was again required to consider the application of the standard of reasonable competence on the part of defense counsel. Once again this Court emphasized the important role of ABA guidelines, holding that the Court long has referred to the ABA guidelines as guides to determining what is reasonable. (quoting Wiggins, supra). This Court agreed with the federal district court -- that the ABA guidelines described "the obligation in terms no one could misunderstand[.]" Id. at 2465-66.

In addition to these cases, cursory research reveals many published opinions by the federal courts, that rely on, or even directly quote, the ABA guidelines, when addressing the issue of ineffective assistance of counsel.

In INS v. St. Cyr, 533 U.S.289, 322 n. 48, 121 S.Ct. 2271, 150 L. Ed. 2d 347 (2001), this Court, quoting ABA standards, held that defense counsel should fully advise the defendant of the importance of possible waiver of deportation. This Court also cited to the ABA standards in Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000), and held that reasonable investigation by counsel would have produced at least a sampling of the background information.

Similarly, the federal circuit courts also give substantial weight to the ABA standards. Referring to ABA standards, the Sixth Circuit Court of Appeals in Bigelow v. Williams, 367 F.3d 562 (6th Cir. 2004), held that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary. The Ninth Circuit Court of Appeals recently looked to ABA standards as well, in determining whether defense counsel's

conduct constituted ineffective assistance. United States v. Leonti, 326 F.3d 1111, 1121 (9th Cir. 2003).

State courts also rely on ABA standards in cases involving ineffective assistance of counsel.

The Supreme Court of New Mexico, citing to the pertinent provisions in ABA guidelines, held that counsel must advise the client of the specific immigration consequences of pleading guilty, if the client is an immigrant. State v. Paradez, 101 P.3d 799 (N.M. 2004).

In sum, a review of the numerous cases which refer to the ABA standards reveals that courts' holdings on what constitutes effective assistance of counsel are a "nutshell" of what is set forth in ABA guidelines.

The Kentucky Court of Appeals' holding that ABA and NLADA guidelines are merely salutary deviates from the way other courts at both federal and state levels treat the guidelines. This Court readily considers ABA guidelines as setting the applicable standards of performance; however, the Kentucky Court of Appeals refused to assign even minimal weight to these guidelines. It is now the time for this Court to clarify the issue and to construct and give weight to these guidelines, as do other courts.

Central to our criminal justice system is the principle that a defendant is entitled to a fair trial and effective assistance of counsel to ensure that these important constitutional rights are protected. Petitioner's trial counsel failed to follow the guidelines set forth by the ABA and NLADA, and such ineffectiveness severely prejudiced the Petitioner. The Kentucky Court of Appeals erred in refusing to evaluate trial counsel's blatant ineffectiveness against these guidelines.

Similarly, the NLADA guidelines must be given at least equal attention and weight, and the Kentucky Court of Appeals erred in holding that they are merely salutory guidelines.

If permitted to stand, the Kentucky Court of Appeals Opinion sends a message to all criminal defense attorneys that the guidelines are not standards of conduct that deserve attention or concern. This is a horrible result and to permit that message to stand is unjust.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted to rectify the Kentucky Court of Appeal's departure from the mandates of this Court. However, if the reasoning used in the opinion of the Kentucky Court of Appeals is followed by other courts, unjust results will follow.

Respectfully submitted,

STEPHEN C. EMERY
Counsel of Record
STEWART ROELANDT STOESS
CRAIGMYLE & EMERY, PLLC
6506 West Highway 22
P.O. Box 307
Crestwood, Kentucky 40014
Telephone: 502-241-4660
Facsimile: 502-241-9301
E-mail: emery@oldhamcountylaw.com
Counsel for Petitioner

APPENDIX A

SUPREME COURT OF KENTUCKY

No. 2005-SC-0641-D

[Filed December 14, 2005]

JEFFREY C. PHELPS Movant	)
v.	)
COMMONWEALTH OF KENTUCKY Respondent	)

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: DECEMBER 14, 2005

/s/ _____
CHIEF JUSTICE

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2004-CA-000710-MR

[Filed July 15, 2005]

JEFFREY C. PHELPS
Appellant

v.

COMMONWEALTH OF KENTUCKY
Appellee

APPEAL FROM OHIO CIRCUIT COURT HONORABLE
RONNIE C. DORTCH, JUDGE
INDICTMENT NO. 01-CR-00160

OPINION
AFFIRMING

BEFORE: HENRY, AND SCHRODER JUDGES; EMBERTON, SENIOR JUDGE.[1]

HENRY, JUDGE: Jeffrey C. Phelps appeals from an order of the Ohio Circuit Court overruling his CR[2] 60.02 and RCr[3] 11.42 motions to set aside his conviction and sentence for First Degree Rape. We affirm

On November 21, 2003 Phelps was convicted by a jury of the Ohio Circuit Court of the offense of First Degree Rape in violation of KRS[4] 510.040, for the forcible rape of his wife. After the guilty verdict, Phelps, with the advice of his counsel, accepted the Commonwealth's offer of a recommendation of a sentence of thirteen years' imprisonment in exchange for Phelps' agreement to waive his right to appeal the rape conviction. First Degree Rape is a Class B felony, which carries a sentence of ten to twenty years' imprisonment. KRS 510.040(2); 532.060(2 (b). At the sentencing, the trial court, after reviewing the presentence investigation report, accepted the Commonwealth's recommendation and sentenced Phelps to thirteen years in prison.

On appeal, Phelps contends that his trial counsel was so ineffective that he was in essence denied his right to counsel

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[1] Senior Judge Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Civil Procedure

[3] Kentucky Rules of Criminal Procedure

[4] Kentucky Revised Statutes

under the Sixth Amendment to the United States Constitution. Phelps argues that his trial counsel was ineffective by failing to properly investigate his case, by failing to properly prepare for the sentencing phase of the trial, and by failing to adequately explain to Phelps the meaning and consequences of the Court's judgment and his right to appeal.

Phelps' appellate counsel filed a single motion in the trial court, requesting relief under both CR 60.02 and RCr 11.42 on the same grounds of ineffective assistance of counsel. The briefs do not address the procedural differences attendant to those rules which have been discussed in the cases. While we perceive strategic reasons for proceeding in that manner at the trial court, we merely note that we review the case as an appeal from denial of RCr 11.42 relief. *See, e.g., Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

The "two-pronged test for ineffective assistance of counsel is (1 whether counsel made errors so serious that he was not functioning as 'counsel' guaranteed by the Sixth Amendment, and (2 whether the deficient performance prejudiced the defense." *Fraser v. Commonwealth*, 59 S.W.3d 448, 456-57 (Ky. 2001), *citing Strickland v. Washington*, 466 U.S. 668, 687; 104 S.Ct. 2052, 2064; 80 L.Ed.2d 674 (1984). In order for a defendant to obtain relief based upon ineffective assistance of counsel, both prongs must be established.

Phelps' first allegation is that trial counsel Leigh Jackson was ineffective because she failed to properly investigate the case prior to trial. This allegation hinges on Phelps' contention that Jackson's investigation consisted of interviewing Phelps for thirty minuted immediately prior to the trial. It is suggested that if Jackson had interviewed Phelps earlier and in more depth information might have been gleaned which might have helped in the defense. It is not

enough to allege that counsel could have done better. "The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the postconviction proceedings provided in RCr 11.42." *Commonwealth v. Pelphrey*, 998 S.W.2d 460, 463 (Ky. 1999), *quoting Dorton v. Commonwealth*, 433 S.W.2d 1[illegible], 118 (Ky. 1968). The burden was not met as to this allegation.

Phelps next alleges that Jackson did not properly prepare for the sentencing phase of the trial. This argument consists primarily of allegations that Jackson failed to comply with the guidelines established by the American Bar Association and the National Legal Aid and Defender Association for criminal defense. The guidelines are salutary and they serve an important function, but they are just that-guidelines. Given that Phelps received a sentence just three years more than the minimum, it is not possible to say that Jackson's performance in the sentencing phase was deficient, much less that any action of Jackson prejudiced Phelps. Our courts " . . .indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . *Pelphry* at 463, *citing Strickland*, supra.

Finally, Phelps argues that Jackson did not properly explain the meaning and consequences of the court's judgment and his right to appeal. We must agree with the Commonwealth that the record clearly reflects that the trial judge fully explained these matters and that Phelps responded appropriately and with apparent understanding throughout the colloquy. Jackson properly explained the range of possible sentences to Phelps on record. Even if it is accepted as true that Jackson failed to explain these matters to Phelps, no prejudice can be shown since the record clearly reflects that they were explained by court

> "In considering an ineffective assistance of counsel claim, the reviewing court must consider the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance".

Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe* ___S.W. 3d ___ (Ky. 2005). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render add rendering reasonably effective assistance". *Id.* Jackson conducted pretrial discovery, tendered instructions to the trial court, conducted vigorous cross-examination of the Commonwealth's witnesses and presented a reasoned and persuasive opening statement and summation. We conclude that she provided Phelps at least adequately effective assistance, and we therefore affirm.

ALL CONCUR

APPENDIX C

COMMONWEALTH OF KENTUCKY
OHIO CIRCUIT COURT

Action No. 01-CR-00160

[Filed March 27, 2004]

COMMONWEALTH OF KENTUCKY Plaintiff	)
v.	)
JEFFREY C. PHELPS Defendant	)

ORDER

The Defendant having filed a motion for relief pursuant to R.CR 11.42 and CR 60.02, and the Court having heard this matter on March 11, 2004, and the Court being otherwise sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant's motion for relief pursuant to CR. 60.02 and R.CR 11.42 is hereby overruled.

This is a final and appealable order, and there is no just cause for delay in its entry or execution.

SO ORDERED AND ADJUDGED, this the 25th day of March, 2004.

/s/_____

RONNIE C. DORTCH, CIRCUIT JUDGE
OHIO CIRCUIT COURT

APPENDIX D

COMMONWEALTH OF KENTUCKY
OHIO CIRCUIT COURT

Action No. 01-CR-00160

[Filed March 18, 2004]

COMMONWEALTH OF KENTUCKY Plaintiff	)
v.	)
JEFFREY C. PHELPS Defendant	)

ORDER

The above styled matter, having come before this Honorable Court by motion, and this Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant's 11.42 Motion is overruled and this order is final and appealable.

SO ORDERED, this the 18th day of March, 2004.

/s/ _____
JUDGE, OHIO CIRCUIT COURT

APPENDIX E

OHIO CIRCUIT COURT

Action No. 01-CR-00160

[Filed August 31, 2001]

COMMONWEALTH OF KENTUCKY
Plaintiff

v.

JEFFREY C. PHELPS
Defendant

KRS: 510.040
UOR: 11032
RAPE, 1ST DEGREE

INDICTMENT

The Grand Jury charges that on or about August 14, 2001 in Ohio County, Kentucky, the above-named defendant, Jeffrey C. Phelps, committed the offense of Rape 1st Degree when he engaged in sexual intercourse with Zara Phelps by forcible compulsion.

Against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/_____
Misty McCormick
FOREMAN

Presented by the foreman of the grand jury to the court, in the presence of the grand jury, and received from the court by me and filed in open court this the 30th day of August, 2001.

Gaynell Allen, Clerk

BAIL $5,000.00 Surety or 10% Cash

Defendant's Height: 5'7
Weight: 145
Hair: Blonde
Eyes: Brown
Race: White-Male

The following appeared before the Grand Jury as witnesses for the Commonwealth:

Det. Susan DeWitt
Kentucky State Police
Henderson, Kentucky